

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>NANCY J. APEL</b>	)	
Claimant	)	
VS.	)	
	)	Docket No. 210,801
<b>J. C. PENNEY COMPANY, INC. &amp; McPHERSON LAW OFFICE, CHTD.</b>	)	
Respondents	)	
AND	)	
	)	
<b>HELMSMAN MANAGEMENT SERVICES, INC. &amp; AETNA CASUALTY &amp; SURETY COMPANY</b>	)	
Insurance Carriers	)	

**ORDER**

Claimant, respondent J. C. Penney Company, and its insurance carrier Helmsman Management Services, Inc. appeal from a May 1, 1998 Award entered by Administrative Law Judge Bruce E. Moore. The Appeals Board heard oral argument on December 2, 1998.

**APPEARANCES**

Claimant appeared by her attorney, M. John Carpenter of Great Bend, Kansas. Respondent J. C. Penney Company (hereinafter Penney's) and its insurance carrier appeared by their attorney, Jerry M. Ward of Great Bend, Kansas. Respondent McPherson Law Offices, Chtd. (hereinafter McPherson) and its insurance carrier Aetna Casualty & Surety Company appeared by their attorney Gregory D. Worth of Lenexa, Kansas.

**RECORD AND STIPULATIONS**

The Appeals Board considered the record and adopted the stipulations listed in the Award.

**ISSUES**

The ALJ limited claimant's award of permanent partial disability compensation to the percentage of functional impairment, finding claimant refused respondent's offer of accommodated work at a comparable wage and has essentially removed herself from the open labor market. The ALJ found claimant's functional impairment to be 12 percent and

apportioned the permanent partial disability award at 8 percent against respondent Penney's and its insurance carrier and 4 percent against respondent McPherson and its insurance carrier.

Claimant contends she is totally disabled from any kind of employment. In the alternative, claimant contends she is entitled to work disability because the respondent's job offer would have unreasonably required her to work outside her restrictions. Claimant also disputes the ALJ's findings concerning her percentage of functional impairment.

Respondent Penney's disputes the ALJ's finding that claimant suffered an 8 percent impairment of function to the body as a whole as a result of the July 12, 1994 accidental injury. It is this respondent's position that claimant had no permanent impairment from this accidental injury. Accordingly, Penney's would have no liability for medical or temporary total disability after claimant returned to work at J. C. Penney. This respondent does not dispute that it owed the 1.14 weeks of temporary total disability in the amount of \$68.82 and the \$513.96 in medical expenses it voluntarily paid, but does dispute having any liability for the 48 weeks of temporary total disability and the \$4,082.88 in medical it was ordered to pay by the June 17, 1996 and January 15, 1997 preliminary hearing orders.

Respondent McPherson, in its brief, also lists as issues the following:

1. Whether claimant's alleged accidental injuries arose out of and in the course of her employment for this respondent.
2. The nature and extent of claimant's disability.
3. Whether claimant's deteriorating condition after January 1996 can be attributable solely to this respondent, and if so, whether this respondent should receive a credit in the amount of \$985.48 for an overpayment of temporary total disability.
4. Whether this respondent is entitled to a credit for a three week overpayment of temporary total disability.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the entire record and having considered the briefs and arguments of the parties, the Appeals Board finds that the Award entered by the ALJ should be affirmed.

The findings of fact and conclusions of law enumerated in the Award by the ALJ are found to be accurate and are adopted by the Appeals Board. Claimant's testimony concerning her ability and willingness to work has been inconsistent and contradictory. She has said that she is not capable of working in any job but also contends she would accept an offer of employment that was within her restrictions. The fact remains that she refused to attempt the accommodated job offered by respondent McPherson. The Appeals Board agrees that claimant's refusal of the accommodated job invokes the public policy considerations announced in Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140,

*rev. denied* 257 Kan. 1091 (1995). Although this result may seem harsh given that claimant's perception of her inability to perform any substantial work may be genuine and not a conscious attempt to manipulate her workers compensation award, to assess a substantial work disability award against respondents would, under these facts, be unfair and unjust. The Kansas appellate courts have made clear the overriding public policy rests with denying work disability under circumstances such as these. See, e.g. Lowmaster v. Modine Manufacturing Co., 25 Kan. App. 2d 215, \_\_\_ P.2d \_\_\_, *rev. denied* 9/10/98; Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

The Appeals Board also agrees with the analysis of the record by the ALJ regarding causation and his apportionment of liability as between the two respondents.

Respondent McPherson, however, is granted a credit pursuant to K.S.A. 44-525(c) against the permanent partial disability award for the 3 weeks of temporary total disability it paid for the period after May 6, 1997, which is the date Dr. Lawrence R. Blaty said claimant had reached maximum medical improvement.

#### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Bruce E. Moore dated May 1, 1998, should be modified to grant respondent McPherson Law Office, Chtd. and its insurance carrier Helmsman Management Services, Inc. a credit for 3 weeks of temporary total disability compensation it paid claimant at the rate of \$102.78 per week or \$308.34, but is otherwise affirmed.

#### **IT IS SO ORDERED.**

Dated this \_\_\_\_ day of December 1998.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: M. John Carpenter, Great Bend, KS  
Jerry M. Ward, Great Bend, KS  
Gregory D. Worth, Lenexa, KS

Bruce E. Moore, Administrative Law Judge  
Philip S. Harness, Director